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No. 89-1399

In The

Supreme Court of the United States

October Term, 1989

INTERNATIONAL SOCIETY OF KRISHNA CONSCIOUSNESS OF CALIFORNIA, ETC., ET AL.,

Petitioners,

v.

ROBIN GEORGE AND MARCIA GEORGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In support of their petition for writ of certiorari, Petitioners advance three issues. Respondents oppose certiorari in this case based on the following: (1) The issues presented in the petition for writ of certiorari were not properly raised or adequately preserved in the courts below, (2) the California Court of Appeal was correct in concluding that the conduct giving rise to Petitioners' liability to Marcia George was constitutionally-protected because it was not "religiously motivated," (3) Petitioners' suggestion that the First Amendment prohibits the imposition of tort liability against a religious organization in the absence of a showing of "actual malice" is not factually or legally sound, and (4) Petitioners' argument that the award of punitive damages in this case violates the First Amendment and due process principles is unsupported by the record.

FACTUAL OVERVIEW[1]

In their "factual" statement, Petitioners (through insinuation, inference and selective storytelling) attempt to create the impression that they are the unwitting and innocent victims of an "intra-family" squabble between a "genuine convert" and her parents. Petitioners suggest that after a "heresy trial" staged by the "avowed enemies" of their religion, they were subjected to a multi-

[1] Respondents adopt, by this reference, the factual statement contained in their Opposition To Application For Stay (filed April 6, 1990).

million dollar tort verdict based solely on the emotional distress caused to the parents as a result of their philosophical objections to their daughter's new religion.[2]

Respondents respectfully submit that Petitioners' statements are misleading and dishonest. The record of this case reveals that the Georges were a close knit and loving family before Robin went to the Laguna Beach temple in August 1974. (RT 1397) Contrary to Petitioners' suggestion that the Georges were religiously bigoted people who were "strenuously opposed" to the Krishna faith, the testimony at trial establishes that fourteen-year-old Robin began investigating the Krishna religion with her parents' consent and permission. While the parents did not agree with everything the Krishnas believed in, Marcia George had no philosophical complaints with the religion per se. Robin's parents objected to her practicing the tenets of her new-found religion, however, when it began to adversely effect Robin's health and education.

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[2] Petitioners assert that "the jury awarded damages, including punitive damages, in an amount **calculated** to bring the [Krishna] religion in this country to an end." (Petition, p. 9) They also repeatedly state that this case places at risk "all of the assets of the Hare Krishna religion in most of North America" and that the underlying judgment is "a virtual death sentence for the religion" in the United States and Canada. (*Id.*)

Respondents note that these statements are completely without support in the record and, in fact, contrary to the findings of the trial court based upon its review of documents which (by **Petitioners'** choice) were not made part of the record. Respondents respectfully submit, therefore, that such statements should be disregarded by this Court.

- Mrs. George complained to Rsabadeva that her daughter was too young and needed to finish her education. (RT 525-527)
- Mrs. George also objected to the religion because it was ruining her child's health. (RT 525-527)

In response to the concerns expressed by Robin's parents, Petitioners told Robin to run away from home[3] and whisked her off to New Orleans. Having thus severed the relationship between a child and her parents, Petitioners felt no compulsion to inform the Georges that their daughter was safe. As Marcia testified at trial, she made daily visits to the Laguna Beach temple to inquire about her daughter:

> I told [Rsabadeva] about my husband's weak heart condition and that he was taking Robin's disappearance very, very badly. He was very distressed over it and he was very anxious and tense and I was afraid it would hurt him, that it would damage him more. **I begged him again, "Please, if you know where Robin is, please let us know so we can know, at least, that she's all right,"**. . . . (RT 897)

Despite Marcia's desperate pleas for information, Rsabadeva stated that Robin was not within the "movement." He laughed about Mr. George's illness, stating

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[3] In their statement (Petition, pp. 2-3, fn. 2), Petitioners assert (for the first time in these proceedings) that the removal of Robin from her home and parents was based on a tenet of their religion. At all times during trial, Petitioners took the position that such conduct was not based on a tenet of their religion – but, rather, was the result of the purely secular transgressions of youthful devotees.

that another devotee's father had a heart attack but did not die. (RT 600-601, 897)

Faced with Petitioners' silence and deceit, Marcia stopped visiting the Laguna Beach temple. On her last visit, she gave Rsabadeva a telephone number and, in her own words:

> [She simply asked Rsabadeva] if he did ever learn where Robin was, would he please relay the phone number to her so . . . she would be able to call a central place and they would call us and assure us that she was all right, that she was alive and she was well, and he said he would do so if he ever found her. (RT 896)

The Georges never gave up, however. Not knowing whether their child was alive or dead, the Georges (1) sent letters to all North American temples (RT 602, 609-612, 711), (2) sent letters to police departments in all North American cities where temples are located (RT 618-619, 635-637), (3) sent letters to fire departments in all North American cities with temples (RT 651), (4) picketed the Laguna Beach temple (RT 750-751, 753), (5) picketed Rsabadeva's house (RT 755-757), (6) picketed the Laguna Beach temple again (RT 803-810), (7) picketed the San Diego temple (RT 813-814), (8) picketed the Los Angeles temple (RT 817), and (9) made numerous inquiries of various government agencies, including the governor's office (RT 818-821, 844-846).

Eventually, the Georges began gathering support. Their efforts to secure the release of their daughter threatened Petitioners' reputation and recruiting activities. Petitioners therefore began a campaign of threats and actions aimed at silencing the Georges. In the terms used

at trial, Petitioners "waged war" on Robin's parents. While picketing, the Georges were harassed, kicked, hit, shoved and soaked with water. (RT 751-817) At home, they were constantly harassed with threats of violence. At first, Petitioners tried to convince the Georges that their daughter hated them and had decided that she "was better off without them." When these cruel deceptions failed, Petitioners resorted to threats against Robin's life if the Georges persisted with their picketing and letter writing campaign. (RT 806-809) In short, Marcia and her husband were faced with the impossible choice of life and death for their daughter. They were asked to make the choice that no parent should be forced to make: whether to give up and let their daughter live the rest of her life in bondage, or carry on the struggle for her freedom and risk the possibility of her death. It is this agony – not the "distress" over Robin's religious affiliation – which formed the basis for Marcia George's recovery of emotional distress damages in this case.

Respondents submit that Petitioners' conduct in this case is a far cry from religiously motivated "proselytizing." Petitioners' behavior with regard to Marcia George finds no place in ISKCON or any other religion.

REASONS FOR DENYING PETITION

I

THE ISSUES RAISED IN THE PETITION WERE NOT ADEQUATELY PRESERVED IN THE COURTS BELOW.

Assuming that a federal question has been properly framed in the petition, it is essential that the question was

raised, presented, and pursued in a timely and proper manner at the appropriate points in state court proceedings below. *Godchaux Co. v. Estopinal* (1919) 251 U.S. 179, 181; *Beck v. Washington* (1962) 369 U.S. 541, 550-554. The policy reasons underlying this requirement were summarized by the Court as follows: (1) federal questions not raised in the state court "are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind," (2) it is important that the state courts be given the first opportunity to consider the applicability of state law in light of the asserted federal constitutional challenge, since state law may often be construed in a way which saves its constitutionality, and (3) the federal question, if adequately raised below, could have been "blocked" by the state court on independent state grounds – thereby rendering review by this Court unnecessary. See *Cardinale v. Louisiana* (1969) 394 U.S. 437, 439.

In most cases, the federal issue must be raised during trial. See *Endelman v. California* (1953) 344 U.S. 357. The issue must also be pursued on appeal to higher state courts, and it must be pursued in a manner and with the requisite degree of specificity as to make appellate review meaningful. See *Beck v. Washington, supra,* 369 U.S. at 549-554. It is generally insufficient to raise the federal question for the first time in a petition to the state's highest court, unless the court actually entertained the petition and expressly decided the question. See *Bailey v. Anderson* (1945) 326 U.S. 203, 206-207.

In this case, the First Amendment and due process issues presented for this Court's review in the petition for writ of certiorari were not raised at trial and were not

pursued in a manner and with the requisite degree of specificity in the appellate courts. First, Petitioners assert that the jury's verdict in favor of Marcia George for emotional distress damages must be overturned because it is based on "jury instructions, pleadings, argument, and testimony [which] defined the tort as encompassing constitutionally protected as well as unprotected activity." (Petition, p. i) However, as the California Court of Appeal noted in its decision (Petition, App. 41a-42a), Petitioners did not object on this ground to the instructions on emotional distress damages which were read to the jury by the trial court (or propose that additional specific limiting instructions be given to the jury). Petitioners also did not advance this constitutional argument as an assignment of error in their appellate briefs.[4] As the

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[4] On appeal, Petitioners challenged the jury's verdict in favor of **Robin** for false imprisonment on First Amendment grounds. However, Petitioners argued that the jury's award of emotional distress damages to **Marcia** were (1) not supported by substantial evidence, and (2) barred by the statute of limitations.

Since the jury's award of damages to **Robin** was eliminated by the California Court of Appeal, Petitioners are now attempting (for the first time) to challenge the award to **Marcia** on First Amendment grounds by "intertwining" it with the verdict in favor of Robin. As discussed in more detail below, Petitioners are incorrect in suggesting that the jury's award of emotional distress damages to Marcia was based on her "disapproval of Robin's choice of religion." Throughout this case, the claims of Robin and Marcia George have been treated **"separate from and independent of"** each other. (RT 8685) Petitioners' attempt, at this stage in the proceedings, to "bootstrap" Marcia's judgment to Robin's recovery in order to preserve the First Amendment issues in this case should not be condoned.

Court of Appeal's decision states, Petitioners asserted "for the first time at oral argument" that the case was presented to the jury in such a way as to allow it to award damages to Marcia caused not only by Petitioners' conduct but also by their constitutionally protected activity. (*Id.*, In so arguing, counsel for Petitioners actually conceded that the evidence at trial otherwise supported a cause of action for intentional infliction of emotional distress. (*Id.*)

Second, Petitioners assert that the First Amendment prohibits the jury's award of compensatory tort damages to Marcia for emotional distress damages in the absence of a finding of "actual malice." (Petition, p. i) This novel constitutional argument was **never** raised by Petitioners in the courts below.[5] As a result, it has never been tested in the crucible of the courtroom, and it has not been scrutinized by an appellate court based on its independent review of the record. If this Court accepts this issue for review, it will be forced to conduct its examination of the record without the benefit of a jury's factual findings or the intermediate appellate court's legal analysis of their sufficiency.

Finally, Petitioners contend that the award of punitive damages in this case violates the First Amendment and the Due Process Clause. As set forth in more detail below, Petitioners resisted all of Respondents' attempts to discover financial information relevant to the punitive

[5] Unlike Petitioners' other constitutional arguments, the assertion that the First Amendment mandates a showing of "actual malice" in this case was not even advanced as a basis for overturning the judgment in favor of **Robin** George.

damages claim and refused to present any evidence to the jury concerning their net worth. Petitioners also failed to submit any jury instructions outlining additional factors to be considered by the jury in awarding punitive damages and/or the burden of proof they now claim is required in such cases.

Nevertheless, on appeal, Petitioners challenged the resulting punitive damage award on the grounds that it was "excessive and contrary to law." Petitioners' "constitutional" arguments fell into the latter "catch all" category and were discussed in only the most general terms.

Petitioners now argue, with great specificity, that the punitive damage award (1) violates the First Amendment because it is too burdensome and poses a threat to the free exercise of their religion, (2) violates the Due Process Clause because the jury was not properly instructed as to the appropriate factors to consider and the burden of proof required in punitive damage cases, and (3) violates constitutional standards because it punishes persons "who took no part in the commission of the tort."[6]

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[6] Respondents object to Petitioners' statement (without any supporting citation) that the tortious conduct giving rise to the punitive damage award involved only the misdeeds of "a few isolated ISKCON officials who are no longer affiliated with the religion." (Petition, pp. 25-26) In so arguing, Petitioners suggest (for the first time) that they are completely innocent of any wrongdoing. (*Id.*)

Respondents submit that this statement is totally inappropriate. At all times during the proceedings below, Petitioners embraced the conduct of the individual co-defendants in this case as their own. Petitioners never asserted, either at

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Respondents submit that the Court should decline to review Petitioners' claims. As a result of Petitioners' failure to directly address the issue in the courts below, the case does not present an appropriate vehicle for the Court to visit the constitutional questions advanced by Petitioners.

In their Reply to Respondents' Opposition to Stay, Petitioners assert that although some (or all) of these issues may not have been raised at the trial level and/or inadequately raised in their previous appellate briefs, the issues have nevertheless been "properly presented for this Court's review" as "additional legal arguments" in support of their claims. (Reply, pp. 21-22) In response, Respondents note that this Court has, in the past, accepted only those cases in which the constitutional questions involved have been fully and fairly litigated in the courts below. See *Street v. New York* (1969) 394 U.S. 576; *Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989) 109 S.Ct. 2909; *Bankers Life & Casualty Co. v. Crenshaw* (1988) 108 S.Ct. 1645. Obviously, the Court, in considering whether

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trial or on appeal, that they should be treated separately from the individual co-conspirators. If these individuals have, in fact, disassociated themselves from Petitioners' religion, it is irrelevant to the constitutionality of the judgment below. Since the "factual" assertions contained in Petitioners' statement are beyond the scope of the record, there is no way of judging their veracity.

Respondents submit that Petitioners' desperate attempt to distance themselves from the conduct of their leaders is disingenuous and untimely. It should not be considered by this Court.

to grant certiorari, may "pick and choose" between the cases presented to it for discretionary review. The interests of justice are not served where (as here) the Court is urged to review the lower court's decision on grounds which differ substantially from those advanced by the Petitioners in the courts below.

II

THE JUDGMENT IN THIS CASE DOES NOT VIOLATE CONSTITUTIONAL STANDARDS BECAUSE THE MISCONDUCT GIVING RISE TO PETITIONERS' LIABILITY TO MARCIA GEORGE WAS NOT "RELIGIOUSLY MOTIVATED."

Petitioners also assert that the Court should grant review in this case because the California Court of Appeal has "crafted a novel exception" to the constitutional principles enunciated by the Court in *N.A.A.C.P. v. Claiborne Hardware Co.* (1982) 458 U.S. 886 and *Street v. New York* (1969) 394 U.S. 576. (Petition, p. 18) In particular, Petitioners argue that the jury's verdict in this case was based on "an intertwining of constitutionally protected activity (proselytizing) and unprotected activity (deception and concealment)." (Petition, p. 20)

The Court of Appeal addressed Petitioners' claim as follows: (1) The record does not support Petitioners' assertion that Marcia George's claim for emotional distress damages was based on "her daughter's conversion to and practicing of the Krishna religion" (Petition, App. 42a-43a), (2) it was "inconceivable" (in light of the instructions[7] given by the trial court in this case) that the

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[7] As noted by the Court of Appeal, Petitioners did not object on this ground to the jury instructions given at trial; nor

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jury's award of emotional distress damages to Marcia could have been based on constitutionally protected activity (Petition, App. 42a), (3) the trial judge's review and remittance of the jury's award to Marcia ensured that the verdict was not premised upon protected First Amendment activities (Petition, App. 43a and App. 85a-86a), and (4) based upon its independent review of the record, the Court of Appeal concluded "with certainty" that Robin's conversion and Petitioners' actions to facilitate it was **not** the basis for the judgment in favor of Marcia. (Petition, App. 43a)

Respondents submit the Court of Appeal's analysis of this issue is correct. First, the record is replete with examples of Petitioners' physical and emotional mistreatment of Maria George.[8] (RT 758, 759, 806, 808-809) The jury did not award emotional distress damages to Marcia because she was upset over her philosophical differences with Petitioners.[9] The verdict in this case was based on evidence that Petitioners intentionally severed Marcia's relationship with her 14-year-old daughter and thereafter

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did they propose any additional limiting instructions to eliminate the alleged problem. (Petition, App. 41a-42a)

[8] See FACTUAL OVERVIEW, *supra*.

[9] Contrary to Petitioners' suggestion, the jury instructions in this case did not permit the imposition of liability for emotional distress damages "whether or not [Petitioners] 'intended'" to cause distress to Marcia George. (Petition, p. 12) The jury was instructed that they must find defendants acted with the "specific intent" (RT 8402) or "desire" (RT 8403) to cause the plaintiff's distress or with "reckless" or "deliberate" disregard for the "probability" that such distress will result. (*Id.*)

literally "waged war" against Marcia George to prevent her from finding Robin.[10]

Second, the record in this case discloses that the trial judge zealously protected the Petitioners' First Amendment rights during the proceedings below and carefully instructed the jury that Petitioners' religious activities could not be considered in awarding damages in this case.[11] (RT 8413-8415) The jury in this case was instructed

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[10] At trial, Petitioners testified that they were motivated by purely secular feelings when they encouraged Robin to leave home, hid her from her parents, and attempted to harass Marcia and Jim George into submission. (RT 2572-2573, 2670, 2866-2867, 2876-2877, 3007, 3035-3036, 3128-3130) In so testifying, Petitioners explained away their malicious misdeeds as simple transgressions of a youthful membership. (*Id.*)

[11] The trial court instructed the jury as follows:

> The First Amendment to the United States Constitution provides that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.
>
> The 14th Amendment to the United States Constitution provides in part that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction equal protection of the laws.
>
> The International Society for Krishna Consciousness is a religion under the United States Constitution and the Constitution of the State of California.
>
> Freedom of thought, which includes freedom of religious beliefs, is basic in a society of free men. It

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(among other things) that the actionable conduct had to be "extreme and outrageous" going beyond "all possible

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embraces the rights to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faith.

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

The fathers of the Constitution were not aware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious credo on which all men would agree. They fashioned a charter government which envisioned the widest possible toleration of conflicting views.

Man's relation to his God was not – was made not a concern of the state. He was granted the right to worship as he pleases, and to answer to no man for the verity of his religious views.

Religious beliefs, doctrine or practices may not be questioned for truth or falsity. **The First Amendment does not select any one group or any one type of religion for preferred treatment.**

The First Amendment to the Constitution of the United States embraces two concepts: Freedom to believe and freedom to act. The first is absolute, but in the nature of things the second cannot be. Conduct remains subject to regulation for the protection of society.

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bounds of decency so as to be atrocious and utterly intolerable in a civilized society."[12] (RT 8402) The jury

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The Constitution of the United States also recognizes the fundamental interest of parents to guide the religious future and education of their children, and the duty to prepare the child for additional obligations. This includes the right to teach moral standards, religious beliefs and elements of good citizenship. (RT 8413-8415)

[12] The trial court also cautioned the jury as follows:

You must not be influenced by sympathy, prejudice, or passion. (RT 8385)

* * *

The law does not permit recovery of damages for transitory or trivial emotional distress alone. However, a plaintiff is entitled to recover damages for severe emotional distress alone without any accompanying physical harm if such severe emotional distress was actually and proximately caused by the extreme and outrageous unprivileged conduct of another, done **either with the specific intent to cause emotional distress or with a reckless disregard of the probability of causing such distress.**

Extreme and outrageous conduct is conduct which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community.

Extreme and outrageous conduct is not mere insults, indignities, annoyances, petty oppressions or other trivialities. All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.

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was further instructed that the First Amendment "envision[s] the widest possible toleration of conflicting views" and "does not select any one group or any one type of religion for preferred treatment." (RT 8415) It is clear that the judgment in this case is not based upon constitutionally-protected conduct.[13]

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> Extreme and outrageous conduct, however, is conduct which would cause an average member of the community to immediately react in outrage, if he heard the facts of the incident. (RT 8402-8403)
>
> * * *
>
> A defendant inten[ded] to inflict emotional distress if it is established that he desired to cause such distress or knew that such distress was substantially certain to result from his conduct.
>
> A defendant's conduct is in reckless disregard to the probability of causing emotional distress if he has knowledge of a high degree of probability that emotional distress will result and acts with deliberate disregard of that probability, or with a wanton disregard of the possible results. (RT 8403)
>
> * * *
>
> The defendants' conduct is in reckless disregard of the probability of causing emotional distress if he has knowledge of a high degree of probability that emotional distress will result, and acts with deliberate disregard of that probability or with wanton disregard for the possible results. (RT 8405)

[13] In support of this position, Respondents adopt by reference the legal arguments advanced by Robin George in her Petition for Writ of Certiorari in *George v. International Society for Krishna Consciousness, et al.*, No. 89-1398 (filed February 28, 1990).

Finally, after independently reviewing the record, the Court of Appeal concluded "with certainty" that Petitioners' religious activities were not a basis for the judgment in favor of Marcia. (Petition, App. 43a) Contrary to Petitioners' assertion that the California Court of Appeal's review of the record was "ludicrously inadequate" (Petition, p. 19), the decision below reflects a careful and thoughtful analysis of the facts and issues presented by this case. This is exactly the type of "careful examination" of the trial record that was suggested by this Court in *Street v. New York, supra,* 394 U.S. at 589.

For the above-stated reasons, the award of emotional distress damages to Marcia George was properly affirmed by the Court of Appeal. The authorities cited by Petitioners simply do not support their assertion that reversal is required if there is any "possibility" (no matter how remote) that religious activities were considered by the jury. Such a rule would prevent the imposition of liability in virtually every case in which a defendant attempts to cloak his misconduct in the shroud of religious doctrine. It would also make appellate review of any such decision meaningless.

III

PETITIONERS' SUGGESTION THAT THE FIRST AMENDMENT PROHIBITS THE IMPOSITION OF TORT LIABILITY AGAINST RELIGIOUS ORGANIZATIONS IN THE ABSENCE OF A SHOWING OF "ACTUAL MALICE" IS FACTUALLY AND LEGALLY UNSOUND.

In support of certiorari, Petitioners assert that the First Amendment mandates a finding of "actual malice" before compensatory tort damages may be assessed against a religious organization and its members for

damages arising from "religiously motivated" conduct.[14] (Petition, pp. 12-16)

In response, Respondents first note that the evidence set forth above clearly indicates that (1) Petitioners' misconduct toward Marcia George was, in fact, "maliciously motivated," and (2) by Petitioners' own admission, their mistreatment of Marcia George was not religiously motivated in this case.

Second, Respondents point out that Petitioners have cited no authority from this Court, or any other court in the United States, which supports their novel theory of constitutional law. Petitioners' reliance on *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, and *Paul v. Watchtower Bible & Tract Society* (9th Cir. 1987) 819 F.2d 875, is misplaced. The *Hustler Magazine* case is not (as Petitioners suggest) a sweeping new development on the interface between the First Amendment and tort law. Rather, the Court in *Hustler Magazine* appeared to be concerned solely with the viability of free political parody of those who hold themselves out as public figures. 485 U.S. at 51, 54-55. In the Court's words:

> Thus while such a bad motive [hatred or ill-will] may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result **in the area of public debate about public figures.** *Id.* at 53 (emphasis added).

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[14] In their Petition (at p. 12, fn.10), Petitioners assert that the issues presented by this case are of "pressing importance" to the nation – citing the "crippling" jury verdicts awarded against religious institutions in several other recent cases.

Respondents note that all of the cases cited by Petitioners are all factually distinguishable from the instant matter in that they involve claims by expatriated members against their former religious organizations. In this case, of course, Marcia George was never a member of the Krishna faith. The judgment in this case derives from Petitioners' tortious misconduct toward an innocent "outsider."

In *Paul*, a former Jehovah's Witness, who had voluntarily disaffiliated, claimed emotional distress when she went to a Tupperware party and no one would speak to her. The Ninth Circuit found "shunning" was a practice of the faith which did not "constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention." 819 F.2d at 883. The court, however, added that (1) the state might have a legitimate concern where (as in this case) individuals suffer direct harm and (2) civil liability for such a practice could attach where (as here) there is "excessive interference within areas of 'paramount state concern,' i.e., the maintenance of marriage and family relationships. . . ." *Id.* at 878.[15]

Third, Petitioners' attempt to draw an analogy between the instant case and well-established constitutional

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[15] The *Paul* decision was discussed by the Oklahoma Supreme Court in *Guinn v. Church of Christ of Collinsville* (Okla. 1989) 775 P.2d 766. In *Guinn*, the plaintiff (forced to the choice by the church elders) elected to withdraw from church membership, rather than terminate her relationship with an individual who was not a church member. The church elders subsequently publicly branded her a "fornicator" in their own church and several neighboring Churches of Christ – which in the small Oklahoma "bible-belt" town caused her serious distress and hardship.

Based on the *Paul* decision, the Oklahoma Supreme Court held that "for purposes of First Amendment protection, religiously-motivated disciplinary measures that merely **exclude** a person from communion are vastly different from those which are designed to **control** and **involve**." 775 P.2d at 781. In upholding the imposition of tort damages against the church and its elders, the court noted that the record clearly supported the jury's conclusion that the defendants' conduct was a tortious invasion of privacy and an intentional infliction of emotional distress which was not protected First Amendment conduct. *Id.*

principles in the free speech context does not survive judicial scrutiny. The reasons underlying the development of an "actual malice" element in the free speech context are simply inapplicable in this case.

As noted by Justice Stewart at the Sesquicentennial Convocation of Yale Law School [see Stewart, "Or of the Press," 26 Hastings L.J. 361 (1975)], the "special treatment" afforded to the news media under the First Amendment is based upon the "special role" the media plays in our society in disseminating information to the public. In particular, Justice Stewart offered the following supportive observations:

- Since the press is often under time pressures, it is logical that the investigation of "hot news" should be more lenient. The central premise in *New York Times* is that the imposition of a requirement that the press print only that which is technically true would place an intolerable burden on the media's ability to "get the news out."
- Media defendants are in the business of publishing the news and generally lack a personal interest in the information disseminated. Normally, the "news" is made by third-parties and the press must rely on third-party accounts. Under these circumstances, the imposition of the actual malice requirement is reasonable.

Petitioners' suggestion that religious organizations are analogous to media defendants and therefore are entitled to the same "special treatment" (Petition, p. 13[16])

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[16] Petitioners assert that they are entitled to "at least" as much protection as a media defendant. (Petition, p. 13) However, Petitioners are not clear how much "breathing space" they require to recruit new members and "protect" themselves from other "majority" religions.

simply does not hold. In fact, the distinctions between the current case and the free speech decisions cited by Petitioners militates against applying the *New York Times* "actual malice" requirement to religious organizations. Church officials are not "in the business" of publishing news. They do not face severe time constraints in getting their messages out. Most importantly, they are not disinterested third-party disseminators of their religious messages. See *Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 761-762 [where speech is of interest solely to the individual speaker and his specific audience, wholly false and clearly damaging statements will support an award of **both** presumed and punitive damages – even absent a showing of "actual malice"].

Fourth, the adoption of an "actual malice" standard to immunize the activities of religious organizations is not only unnecessary – it would have a constitutionally impermissible result: It would violate the prohibitions of the Establishment Clause which restrict government from taking any action to "aid one religion [or] aid all religions." *Everson v. Board of Education* (1947) 330 U.S. 1, 15.

Finally, even in free speech cases, this Court (and other courts) has recognized that there is a proper accommodation between tort liability and First Amendment freedoms. See *Philadelphia Newspapers* v. *Hepps* (1986) 475 U.S. 758, 768; *Maheu* v. *Hughes Tool Co.* (9th Cir. 1978) 569 F.2d 459, 479-480. Assuming *arguendo* that the principles enunciated by the Court in the free speech context apply to the instant case, the California Court of Appeal has accomplished the appropriate accommodation of interests to guard against the "danger . . . from the coercive activities of those who in the delusion of . . . religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to exercise

their liberties." *Cantwell* v. *Connecticut* (1940) 310 U.S. 296, 310. Simply put: When a religious organization "wages war" against an innocent outsider to silence her protest against the recruitment of her minor child, it subjects itself to liability under any legal standard.

IV

THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT OR THE DUE PROCESS CLAUSE.

In their Petition, Petitioners' attack on the punitive damages award in this case appears to be three-fold: (1) The punitive damage award violates the First Amendment because it is too burdensome and poses a threat to the free exercise of Petitioners' religion, (2) the award violates the Due Process Clause because the jury was not properly instructed as to the appropriate factors to consider and the burden of proof required in punitive damage cases, and (3) an award against a religious body is inappropriate because the effect is to punish persons "who took no part in the commission of the tort." (Petition, pp. 24-29)

The first of these claims is clearly erroneous. Petitioners' objections to the punitive damages award in this case derives, in part, from their own trial strategy. Respondents sought pretrial discovery of the Petitioners' net worth in this case. (CT 2534) Petitioners resisted – arguing that the discovery of this information should await trial and a *prima facie* showing of fraud, malice and oppression under California Civil Code Section 3294 et seq. (*Id.*) After Respondents presented their evidence, the trial judge determined that Petitioners must produce the requested information concerning net worth. (*Id.*) Thereupon, Petitioners complained that their finances were a

"tangled web" and that disclosure of such information would require several additional weeks of trial. (*Id.*) In response, the trial judge gave Respondents the option to produce their financial records "if they felt their case would be helped." (*Id.*) However, Petitioners declined to do so.[17] (*Id.*)

As stated by the trial judge in response to Petitioners' assertion (in their new trial motion) that the jury lacked adequate guidelines upon which to predicate its award of punitive damages:

> The underlying cause [of the alleged lack of standards], in this court's view, lies in the existing state of the law by which punitive damages may be awarded, considering, among other things, the financial condition of the defendants and yet, in this case, did not allow discovery to take place prior to trial. Plaintiffs' request for discovery was denied pursuant to §3295 of the Civil Code. The defendants were successful in invoking that shield to protect them from making disclosure of their financial condition prior to trial. In an abundance of caution, in order to insist that plaintiffs establish their likelihood of entitlement of punitive damages, this court did

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[17] Even though Petitioners refused to disclose this information, the trial court had sufficient evidence (when asked by Petitioners to do so in their new trial motion) to assess the reasonableness of the punitive damages award in this case. During the squabble over Petitioners' financial records, counsel for Petitioners conceded that Petitioners' net worth was *at least* $7-8 million. (Petition, App. 74a-75a) For purposes of remitting the jury's punitive damages award, the trial judge (based on his discussions with counsel and *in camera* review of some of Petitioners' records) estimated Petitioners' net worth at $10 million. (*Id.*)

> not mandate the production of financial records pursuant to said code until a late point in the trial. It became apparent to this court, after several lengthy sessions, and the devotion of many hours by this court and counsel, that defendants' financial condition was indeed a tangled web that would require either a recess of many months to permit discovery or to try the issue before the jury which would require several additional weeks of trial. (Petition, App. 86a)

Under these circumstances, Respondents submit the Court of Appeal was correct in concluding that Petitioners had waived their right to complain on appeal about the amount of the punitive damages awarded by the trial court in this case. (Petition, App. 74a) This case is simply not an appropriate vehicle for the Court to review the First Amendment issue advanced by Petitioners.

Petitioners' second claim is likewise specious. As pointed out by the Court of Appeal (Petition, App. 73a), the factors to be considered by California juries in assessing a punitive damages award are well established. The reasonableness of a punitive damage award must be considered in light of the following: (1) The nature of the defendant's acts, (2) the amount of compensatory damages awarded in the case, and (3) the wealth of the defendant. See *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928; *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740 [*app. dismd.* 450 U.S. 1051 (1980)]. While it is true that California has not established a fixed ratio between the defendant's net worth/the amount of compensatory damages/and the amount of punitive damages, most commentators believe that this is a positive (rather than a negative) aspect of the State's justice system. See *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*

(1984) 155 Cal. App.3d 381, 388. In the past, California's punitive damages statute has survived constitutional scrutiny by courts on several occasions. *Id.* at 388; *Downey Savings & Loan Association v. Ohio Casualty Ins. Co.* (1987) 189 Cal. App.3d 1072, 1101; *Maheu v. Hughes Tool Co.* (9th Cir. 1977) 569 F.2d 459, 480.

In this case, the punitive damages award is more than justified given Petitioners' "outrageous" mistreatment of Marcia George. (Petition, App. 74a) As the trial court explained:

> Defendants urge, inter alia, that the jury was motivated by prejudice and that its passions were inflamed. They argue that such prejudice is obvious from the size of the verdict. This court does not agree with that conclusion. Naturally, it is impossible to ascertain precisely what motivated a jury. However, this court felt that the jury was calm, deliberate, sincerely moved by its sense of obligation to the community and to the parties involved to render a fair and impartial verdict and to follow the law to the very best of its ability. This court feels they did so and would not now demean their efforts by giving them the mantle of excessive or unreasonable passion or prejudice so as to set aside the verdict.
>
> * * *
>
> First and foremost, this court must state that in its view the conduct of defendants toward the plaintiffs was outrageous. Furthermore, this court was struck and strongly suspects the jury was struck by the almost universal lack of candor and probable perjury committed by many witnesses for the defendant. No one, least of all this court, likes to hear from witnesses who only coincidentally tell the truth.

> Although one will never know with certainty what motivated the jury, it may well be that once the jury began to grasp the fact that it could not rely on testimony given by the defendants as being true, that they tended to resolve all factual disputes in favor of the plaintiffs. In this court's view, defendants have only themselves to blame for this state of affairs. (Petition, App. 85a)

Generally, the reprehensibility of the defendant's conduct is the most important factor in awarding punitive damages. See *Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928. The more reprehensible the act, the greater the appropriate punishment. *Id.*

In support of their suggestion that this Court should grant certiorari in this case, Petitioners argue that the remaining award of punitive damages (even after being reduced by the trial judge) violates the Due Process Clause because the jury was not given "workable standards to guide its judgment" in the underlying trial. (Petition, pp. 27-28) Petitioners assert that certiorari should be granted because five Justices of this Court have expressed due process reservations about punitive damage awards under allegedly similar conditions, citing *Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989) 109 S. Ct. 2909, 2923 (BRENNAN, J., joined by MARSHAL, J.) and 2924 (O'CONNOR, J., joined by STEVENS, J.) and *Bankers Life & Casualty Co. v. Crenshaw* (1988) 108 S. Ct. 1645, 1656 (O'CONNOR, J., joined by SCALIA, J.).

Respondents submit that Petitioners' reliance on the above-referenced concurring/dissenting opinions in these two recent Supreme Court decisions is misplaced. In *Browning-Ferris*, the plaintiff was awarded $51,000 in

compensatory damages and $6 million in punitive damages – some 117 times the actual damages suffered by the plaintiff. In *Bankers Life*, the actual damages awarded to the plaintiff totalled $20,000 and the punitive damage award amounted to $1.6 million – some 80 times the actual damage award. Nevertheless, the Court declined to review the due process issue in both cases because the defendants had failed to adequately preserve the issue in the courts below.

Contrary to Petitioners' suggestion (Petition, p. 28), the jury instructions in this case were not "similar" to instruction criticized by Justice Brennan in *Browning-Ferris*. The jury was carefully and thoroughly instructed by the trial court with regard to punitive damages.[18] There is

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[18] The jury instructions included the following admonitions and guidance:

> You may, in your discretion, award such damages if – but only if – you find by a preponderance of the evidence that said defendant was guilty of oppression, fraud or malice in the conduct on which you based your finding of liability.
>
> "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff, or carried on by the defendant with a conscious disregard for the rights or safety of others.
>
> "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard for that person's rights.
>
> "Fraud" means an intentional misrepresentation, deceit or concealment of a material fact known to the

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simply no basis for Petitioners' statement that the judgment in this case was the product of an "uninstructed and inflamed California jury." (Petition, p. 29)

Finally, Respondents challenge Petitioners' assertion that a punitive damage award against a religious body is

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> defendant, with the intention on the part of the defendant of thereby depriving the person of property or legal rights, or otherwise causing injury.
>
> The law provides no fixed standard as to the amount of such punitive damages but leaves the amount to the jurors' sound discretion exercised without passion or prejudice.
>
> In arriving at any award of punitive damages you are to consider the following:
>
> > One, the reprehensibility of the conduct of the defendant.
> >
> > Two, the amount of punitive damages which will have a deterrent effect on the defendant.
> >
> > Three, that the punitive damages must bear a reasonable relation to the actual damage. (RT 8416-8417)
>
> * * *
>
> Punitive or exemplary damages are damages which are awarded for the sake of example, and by way of punishing the defendant. The amount thereof is left to your sound discretion acting without passion or prejudice for or against either party.
>
> However, punitive or exemplary damages should bear a reasonable relation to actual damages. . . .

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inappropriate because the effect is to punish persons "who took no part in the commission of the tort." Punitive damages against corporations are not unconstitutional because they penalize the corporate shareholders; punitive damages against insurance company are not considered fundamentally unfair because the cost of such awards are passed along to the policyholders. Petitioners have presented nothing to support the notion that religious institutions must be afforded special treatment. In fact, as Petitioners are well aware, several courts have affirmed punitive damage awards against religious institutions in the past. See *Allard v. Church of Scientology* (1976) 58 Cal. App.3d 439, 452 [*cert. den.* (1977) 429 U.S. 1091].

In this case, the award was clearly justified by Petitioners' misconduct. Contrary to Petitioners' suggestion, the burden of the punitive damages award in this case will not be borne by persons "who took no part in the commission of the tort." The judgment and receivership were carefully crafted by the courts below to encompass only those responsible for Petitioners' injuries. All property in the receivership is, in some way, connected to Petitioners' efforts to hide

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> If you find that the plaintiffs are entitled to an award of punitive damages as I have previously instructed, you may then consider acts of provocation, if any, by the plaintiffs. Such acts of provocation may be considered by you as mitigating circumstances with respect to an award of punitive damages.
>
> Such acts of provocation, if any, do not absolutely bar recovery of punitive damages, but may be considered a reduction of such damages. The extent of such reduction is within your discretion. (RT 8418)

Robin George from her parents. The judgment debtors in this case include only those ISKCON entities (and their alter egos) which participated in the abduction of Robin George.

CONCLUSION

Based on the foregoing, Respondents submit that the Petition For Writ of Certiorari in this case should be denied.

DATED: April 17, 1990

Respectfully submitted,

PROCOPIO, CORY, HARGREAVES
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